has been done, just how far the military have a right to go. It is conceded that the courts cannot go behind the Governor's proclamation that a state of insurrection exists. If the power under this proclamation is greatly extended, our constitutional guaranties become a scrap of paper.

A. M. K.

SURETYSHIP: CONSTRUCTION OF CONTRACTS OF A SURETY COMPANY.—The difficulty involved in applying the ordinary rules of suretyship to the case of corporations engaged in the business of acting as sureties for profit, is well shown by a decision rendered by the Supreme Court of Kansas in the case of *School District v. Massachusetts Bonding & Insurance Company.*[1] Suit was instituted by the school district to recover on the bond of the defendant company, which insured the performance of a building contract, one of the terms of the contract being that the work should be completed before a specified date. The bond provided that no liability should attach to the surety, unless, in the event of default of the principal, the school district should give notice to the surety immediately upon knowledge thereof and not later than thirty days after default. The work was not completed within the time specified, but no notice was given as provided. The court ruled that since the company had suffered no loss by the failure to receive notice, it was not released from liability on the contract. Mr. Justice West dissented on the ground that the parties had contracted that no liability should attach unless notice was given and that such notice was a condition precedent, performance of which was necessary for recovery.

Ordinarily, under the general rules of suretyship, any material alteration of the contract releases the surety from liability, applying the maxim that "a surety is a favorite of the law". Where, however, as in the above case, the surety undertakes the obligation for profit, it is not entitled to such tender consideration and its contracts are not governed by the rule of *strictissimi juris,* but any ambiguity in the contract is construed in favor of the other party.[2] In fact such surety contracts are interpreted much like insurance contracts, since they are drawn by the company and hedged about by conditions and requirements, which should estop the company from asserting a right to have ambiguous terms construed in its favor, as against any reasonable construction acted upon by the

---

[1] (April 11, 1914), 142 Pac. 1077.

[2] Baglin v. Title Guaranty & Surety Co. (1909), 166 Fed. 356; Atlantic Trust & Deposit Co. v. Town of Laurinburg (1908), 163 Fed. 690, 90 C. C. A. 274; United States Fidelity & Guaranty Co. v. United States (1910), 178 Fed. 692, 102 C. C. A. 192; United States Fidelity & Guaranty Co. v. United States (Guaranty Co. v. Pressed Brick Co.) (1903), 191 U. S. 416, 48 L. Ed. 242, 24 Sup. Ct. Rep. 142.

other party to the contract. This doctrine is supported by the great weight of authority.[3]

The doctrine must not, however, be extended so as to override the express terms of a contract. In the principal case the condition of notice does not impose a hardship upon the party required to give the notice, and is not therefore objectionable in itself; consequently the ruling of the court seems somewhat narrow. Even in insurance contracts, notice and the filing of proofs of loss may be made conditions precedent to recovery, compliance with which must be alleged and proved, irrespective of whether or not the company has been prejudiced by the failure. When the parties contract in clear and unambiguous language that no liability shall attach except under certain conditions, the surety, even though a paid one, is entitled to have the contract construed according to its terms. The parties may make the performance of certain conditions precedent necessary for recovery, and may make things immaterial the subject of their conditions.[4] When they do so their contracts are legal and binding and must be so construed. The court in the principal case seems to have ignored the right of the surety to stand on the unambiguous condition precedent of notice and to have based its decision on a rather severe application of the doctrine that a surety for profit is not "a favorite of the law". The more just rule, and the one which is followed by most courts, is that where the words of the contract admit of more than one interpretation, they should be construed against the surety company, but where the contract is clear and unambiguous, it should be enforced according to its terms.

A. H. C.

TENDER: NON-PRODUCTION OF THE MONEY.—There is language in the case of *Sheller v. Livingston*[1] which, if taken as the basis for future decisions, might lead to erroneous results. In an action of claim and delivery the issue was as to the sufficiency of a tender of storage charges. The debtor had offered to pay them, but had not produced the money, and this non-production was set up at the trial. The court says: "It appears, however, from the evidence that the offer was not accepted by defendant and no objection was made by him at the time that there was no actual production of the amount due as storage charges, nor does it appear that any demand was made that the money be produced.

---

[3] For collection of authorities see 33 L. R. A. (N. S.) 513. The Texas courts hold a contrary view, Lonergan v. San Antonio Loan & Trust Co. (1907), 101 Tex. 63, 104 S. W. 1061; American Surety Co. of N. Y. v. Koen (1908), 49 Tex. Civ. App. 98, 107 S. W. 938.

[4] United States Fidelity & Guaranty Co. v. Rice (1906), 148 Fed. 206, 78 C. C. A. 164; National Surety Co. v. Long (1903), 125 Fed. 887, 60 C. C. A. 623; Beech Grove Improvement Co. v Title Guaranty & Surety Co. (1912), 50 Ind. App. 377, 98 N. E. 373; Knight & Jillson Co. v. Castle (1909), 172 Ind. 97, 87 N. E. 976.

[1] (Oct. 7, 1914), 19 Cal. App. Dec. 491.